

ORIGINAL

Glendale
Ex. 224

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM Docket No. 93-75
)	
TRINITY BROADCASTING OF)	
FLORIDA, INC.)	BRCT-911001LY
)	
For Renewal of License of)	
Television Station WHFT(TV))	
Miami, Florida)	
)	
GLENDAL E BROADCASTING)	
COMPANY)	BRCT-911227KE
)	
For Construction Pedmit for)	
New Television Station in)	
Miami, Florida)	

To: The Honorable Joseph Chachkin
Administrative Law Judge

DIRECT WRITTEN TESTIMONY
OF
MORTON L. BERFIELD

RED LION ASSIGNMENT APPLICATION ISSUE

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Broadcasting Company

Federal Communications Commission

Docket No. 93-75 Exhibit No. 224

Presented by GLENDALE

Disposition { Identified ✓ 5/3/94
Received ✓ 5/3/94
Rejected _____

Reporter M.K. FLEISHMAN

Date 5/3/94

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DIRECT WRITTEN TESTIMONY
OF
MORTON L. BERFIELD

I.
Introduction

1. I am President and a principal of Cohen and Berfield, P.C., which represents Raystay Company (Raystay) and Glendale Broadcasting Company (Glendale) before the Federal Communications Commission (Commission or FCC). I received the degree of Doctor of Jurisprudence from the Law School of the University of Michigan in 1958, was employed as an attorney with the FCC from 1959 to 1964 including service in the Hearing Division of the Broadcast Bureau, and have practiced law in the firm Cohen and Berfield since 1964. My partner, Mr. Cohen, and I have represented George F. Gardner (George Gardner) and entities in which he has or has had an interest such as Raystay and Glendale since the late 1960's or early 1970's.

II.
Expenses incurred in connection with all five
low power television station construction permits

2. I am the author of a letter dated November 7, 1991 to David A. Gardner (David Gardner) concerning expenses incurred by Raystay in connection with five LPTV construction permits it held at that time (TBF Ex. 232). Two of the construction permits were for Lancaster, two permits were for Lebanon, and one permit was for Red Lion, all in Pennsylvania. I prepared this letter at the request of David Gardner.

3. As is reflected in the letter, I was given the figure of

\$30,000 as an amount for which the five permits might be sold, and, based upon my tabulation of known expenses and listing of other expense categories to be researched, I expressed the belief that a total figure in that amount could be justified. There is nothing untoward or unusual in "reimbursement of expenses" cases (such as the sale of construction permits or settlement of hearings) for parties to discuss (and conduct negotiations relative to) a prospective figure and then research the matter to determine if that figure can be justified.

4. Legal fees and expenses. With respect to legal fees in the amount of \$15,397.03, attached as Appendix A, consisting of pages 15-25 of this exhibit, is a tabulation of legal fees and expenses of Cohen and Berfield, together with copies of the invoices on which the tabulation is based. I do not have a copy of the tabulation which I made at the time of the letter, and the attached tabulation is a reconstruction prepared recently for this proceeding. I believe the reconstructed tabulation is accurate for two reasons. First, it reflects the thought processes which I went through at the time of the letter. Second, while the total dollar figure is not precisely the same, it is very close, i.e., within less than two dollars of a total figure of more than \$15 thousand (the total amount as shown in the letter is \$15,397.03, the total amount as shown in the reconstructed tabulation is \$15,395.17, the difference is \$1.86).

5. I personally analyzed the invoices of our law firm and

and performed both the original and the reconstructed tabulations referred to in ¶4. For invoices that had been prepared by me, I referred to the invoice and time records of attorneys that were available. For invoices that had been prepared by Mr. Cohen, I referred to the same sources and also asked Mr. Cohen about the services performed and how he arrived at the amounts billed. When I allocated only a portion of the legal fee on a given invoice (e.g., 50%), I determined if identifiable disbursements (usually FCC filing fees) related to the five construction permits, and I applied the proportionate fee percentage (e.g. 50%) to all other disbursements for which the precise purposes could not readily be determined such as long distance calls, xerox and postage.

6. I included fees and disbursements relative to the preparation and filing of the applications for construction permits and amendments of the applications. Those amendments included, initially, presentations relative to the good character of George Gardner and, subsequently, a pledge to institute an operational compliance program which would apply to Raystay's existing low power television station in Dillsburg, Pennsylvania and to the new stations when built to assure that the stations would be operated in accord with the Commission's rules. In addition to the written presentations, Mr. Cohen had personal telephone conversations and visits with the Commission's staff. While these presentations and related consultations were an

outgrowth of a previous hearing proceeding involving Adwave Company of which George F. Gardner was the sole stockholder, that proceeding had been terminated and the only vehicle available for these presentations and consultations was the five then-pending applications for LPTV construction permits. Stated another way, those permits would not have been granted until and unless the Commission was persuaded that the conditions imposed in the Adwave proceeding had been fulfilled.

7. Since a representation had been made to the Commission in the amendments to the construction permit applications that an operational compliance program would be established, I included a portion of the initial establishment and implementation of such a program in the construction permit fees. In addition to the fact that the establishment of the compliance program was essential to grant of the applications and thus fees related thereto were prosecution-of-application expenses, it was my opinion that the compliance program would provide a format and routine for the subsequent implementation of the compliance program at the five LPTV stations when they commenced operation. Thus, these were also expenses incurred relative to "other steps reasonably necessary toward placing the station in operation" as permitted under the Commission's regulations. 47 C.F.R. §§73.3597(c)(2) and 74.780. Stated another way, without the initial establishment and implementation of a compliance program at the operating station at Dillsburg, a full-blown initial

establishment and implementation expense would have to be incurred at the first of the other five LPTV stations to commence operations. I thus thought inclusion of some initial compliance program fees was appropriate.

8. FCC filing fees. With respect to FCC filing fees in the amount of \$1,875, I determined this amount from our file copies of the five applications for construction permits reflecting the fee payments.

9. Engineering fees. With respect to engineering fees, I did not have any invoices by Mr. Hoover in my files. I secured the figure of \$7,275 from David Gardner.

10. Expenses in obtaining transmitter sites. With respect to the expenses in obtaining antenna sites in the amount of \$1,092.01, I did not have any invoices in my files and I secured this figure from David Gardner.

11. Other, undetermined expenses. It has been my experience that after the initial determination of the principal expenses such as the tabulation reflected in the letter, additional expenses can be found in more detailed research. Such additional expenses often include travel expenses (I was aware that David Gardner had traveled to Washington in conjunction with the initial preparation and filing of the five applications for construction permits), long distance telephone, postage and other similar office expenses (these are always present, although some effort is required in order to develop evidence of the amounts),

equipment on hand that is to be sold with the permit, rental fees or other payments to the owners of the transmitter sites (the expenses in obtaining transmitter sites listed in my letter were the fees and expenses of an agent retained by Raystay to locate two of the three sites, i.e., in Lebanon and Lancaster), salary payments to employees who are not principals of the applicant, and the like. In fact, when discovery research was conducted recently, an additional \$3,000 in payments to the consulting engineer were uncovered consisting of \$1,000 for frequency searches for each of the three sites, i.e., Lebanon, Lancaster and Red Lion, involved in these construction permits.

III.

Allocation of expenses to the Red Lion
low power television station construction permit

12. I am the person who provided the figures for expenses allocated to the Red Lion construction permit in the application for FCC consent to the assignment of that permit filed in January 1992, as set forth in the certification attached as Appendix B, exhibit page 26. I was advised by David Gardner that the Red Lion construction permit was being sold for \$10,000 and was asked to determine if such a figure could be supported, and to provide the expense information to be submitted to the Commission. It was my understanding that this information would be furnished to counsel for the assignee, the law firm Arent, Fox, Kintner, Plotkin & Kahn, which was to prepare the assignment application. This is a procedure often followed in assignment applications

since the assignor no longer has a long-term interest in the matter and desires to limit its legal costs in effecting the assignment and consummating the transaction. I arrived at figures for legal (\$7,698), engineering (\$2,425) and FCC filing fees (\$375), totaling \$10,498, and provided them to David Gardner by telephone in late November or December 1991. On December 20, 1991, the date I was leaving for a vacation that extended into January 1992, I thought the matter had been taken care of, and did not include it on the list of pending projects that I gave to Mr. Cohen as I went on vacation.

13. The basis for my allocation of expenses for the Red Lion application is described in the following paragraphs.

14. Legal fees and expenses. With respect to legal fees in the amount of \$7,698, I employed one half of the total amount of legal fees for all five construction permits (\$15,397). My rationale for doing so was that, for the most part, the work relating to any one of the permits also related to each of the other permits, and, accordingly, the lion's share of the fees for such work could be allocated to Red Lion or to any other individual construction permit that might be the first or only permit to be assigned.

15. Thus, the initial fee in the amount of \$5,200 for the preparation and filing of the five applications was based upon a fee in the amount of \$4,000 for one application and \$300 for each added application, on the premise that there was very little

change in the non-engineering parts of the applications being prepared by legal counsel. In point of fact, I prepared the complete non-engineering portion of the Red Lion application first and then the Lebanon and Lancaster applications were copied from the Red Lion model, in each instance upon receipt of the engineering portions of the application (transmittal letters are attached as Appendix C, pages 27-29 of this exhibit). The only changes were the channel number, the community of license and the site information.

16. Amendments of the applications were all identical except for the channel number, community of license and file number. The presentations to the Commission, and Mr. Cohen's consultations with the FCC staff, regarding the good character of George Gardner and the compliance program for operating stations were an activity that applied identically to all five applications. So was the initial work on the implementation of the compliance program at the operating station in Dillsburg, Pennsylvania, establishing the format and routine for implementation of the compliance program at any and all of the stations which might become operational under the five permits.

17. In an earlier declaration, I indicated that 75% or 80% of the legal fees could have been attributed to the Red Lion permit. This was the case with respect to the initial fee (\$5,200) for the preparation and filing of the applications (i.e., \$4,000 for the first application and \$1,200 for the

additional four applications). With respect to the balance of the fees, an even higher percentage could be attributed to the Red Lion permit or any other initial individual permit allocation, and overall this could well have been a good 90% of the total, consisting of all of the legal work except (a) the add-on fee of \$300 for each of the other four applications as initially prepared, (b) negligible amounts for filing amendments with changed channel numbers, communities of license and FCC file numbers and (c) negligible amounts for reviewing drafts of virtually identical "LMA" agreements for each of the construction permits (compare LMA agreement for Red Lion, attached as Appendix D, pages 30-45 of this exhibit, with LMA agreements for Lebanon and Lancaster in the record as TBF Exs. 218-221).

18. Under these facts, the allocation of one half of the legal fees (and disbursements) to the Red Lion permit was conservative.

19. Engineering fees. With respect to engineering fees in the amount of \$2,425, at the time I allocated this amount to the Red Lion permit in December 1991, I did not have before me a copy of any invoices of the engineer. I had the dollar figure in the amount of \$7,275 given to me on the phone by David Gardner. I divided this amount into thirds, and listed \$2,425 for Red Lion. My rationale was this.

20. I had worked with the engineer, Mr. Hoover, and David Gardner from the beginning when the client first expressed

interest in filing for low power construction permits during the FCC window that opened in March 1989. We began the work in November 1988, in anticipation that it was about time for the Commission to open up another LPTV filing window. In that initial work, the client provided to Mr. Hoover various transmitter locations in which it had an interest and Mr. Hoover performed studies of the frequencies that would be available for LPTV operations from those locations. I recalled that Mr. Hoover had charged a fixed fee for each of the locations that he surveyed. We ended up filing applications on three of those locations, i.e., Red Lion, Lebanon and Lancaster. For these three locations, attached are copies of Mr. Hoover's letters (Appendix E, pages 46-48 of this exhibit) with copies of the frequency studies pertaining to Red Lion (Appendix F, pages 49-55 of this exhibit), Lebanon (Appendix G, pages 56-66 of this exhibit) and Lancaster (Appendix H, pages 67-75 this exhibit). I assumed that the engineering figure given to me by David Gardner included Mr. Hoover's flat fee for each location for the initial frequency study work. This in my mind suggested a division of the engineering fee in thirds.

21. I had other knowledge supporting an allocation of one third (or otherwise allocating to Red Lion something more than simply dividing the engineering fee arithmetically by five). (a) I was aware that the engineering portions of two applications for the same site, i.e., two applications each for the Lebanon and

Lancaster sites, involved less work per application than the engineering portions of applications for entirely different sites. Compare engineering portions of Lebanon applications (TBF Exhs. 204, 206) and Lancaster applications (TBF Ex. 203-204). I was aware that Mr. Hoover was responsible for securing FAA clearances for three sites (not five). (c) I was aware that in securing FAA clearance for the three sites, particularly the Red Lion site which was the lead site studied by the FAA, there were problems involving the electromagnetic interference issue which then was of major concern to that agency, requiring more extensive correspondence between Mr. Hoover and the FAA than normal. Copies of such correspondence as provided to me at the time are attached in Appendix I, pages 76-112 of this exhibit.

22. It was not until the discovery phase under the instant Red Lion reimbursement issue that I discovered that, in addition to the \$7,275 fee used in my allocation, Mr. Hoover had also previously been paid an additional \$6,000 for the low power frequency searches for six transmitter sites, at the rate of \$1,000 per location, which included Red Lion (York), Lebanon and Lancaster, and three other areas which were not filed on. Pertinent materials obtained during discovery taken from the files of Raystay and/or Mr. Hoover are attached as Appendix J, pages 113-116 of this exhibit. If at the time of my allocation I had seen Mr. Hoover's invoice of \$7,275 (copy attached as Appendix K, page 117 of this exhibit, for handy reference) and if

I had been aware that Mr. Hoover had also been paid an additional \$1,000 for the Red Lion frequency search, I would have allocated \$2,525 to the Red Lion application for engineering expense consisting of \$1,000 for the frequency search, \$1,350 for the FCC application (one-fifth of the fee on the invoice for the five FCC applications) and \$175 for the FAA filing for the Red Lion site (one-third of the fee on the invoice for FAA forms).

23. The difference between what I allocated (\$2,425) and what I would have allocated with full knowledge of the invoice and the additional payment to Mr. Hoover (\$2,525) is relatively small (\$100) and shows that, if anything, I under-allocated the engineering fee for Red Lion by that amount.

24. FCC filing fees. With respect to FCC filing fees in the amount of \$375, this was the cost of a single application, taken from our law firm's records containing a copy of the Red Lion application as filed.

IV.
Filing and grant of the Red Lion
assignment application

25. Shortly after I returned to my office on January 13, 1992, I learned that the Red Lion assignment application had been or was being filed by counsel for the assignee (the record shows that the actual date of filing by Mr. Tillotson of Arent, Fox, Kintner, Plotkin & Kahn was January 14, 1992) and that lawyers in our firm had participated in review and preparation of the assignor's portion of the application, including the expense

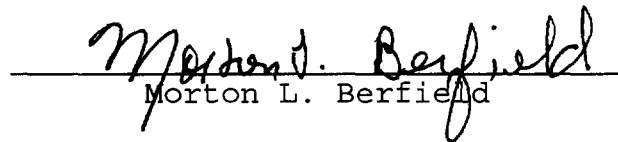
certification. I reviewed the application and confirmed that the expense figures were those which I had provided. I thus believed and continue to believe that the information was accurate.

26. The expense calculations and the Red Lion allocation were information prepared by me, primarily based upon the records of our law firm and, as communications counsel, I was the one who made the decisions relative to what expenses could be attributed to all five permits in the aggregate and what expenses could be attributed to Red Lion as a single permit and the first permit for which reimbursement was being sought. I retained for a time my original worksheet tabulation and would, of course, have been prepared to furnish any additional information if needed by the Commission's staff in processing the Red Lion assignment application. We were never notified that any additional information was needed, and the application was routinely granted in March 1992.

27. In addition to my belief that the expense data were accurate, I wish to state that there was never an intent on my part to misrepresent the facts to the Commission or to conceal any facts from the Commission.

Glendale
Ex. 224
Signature Page

The foregoing statements are true and correct to my best information and belief, and are given under penalty of perjury.


Morton L. Berfield

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APPENDIX A

TABULATION OF LEGAL EXPENSES
ALLOCATED TO FIVE CONSTRUCTION PERMITS

<u>Item</u>	<u>Amount Allocated</u>
Invoice dated March 13, 1989 (100%)	\$ 5,222.03
Invoice dated April 4, 1990 (100%)	4,084.90
One invoice dated June 4, 1990 (100%)	1,507.76
Another invoice dated June 4, 1990:	
Fees (50%)	1,600.00
Disbursements (50% of \$112.39)	56.20
Invoice dated August 7, 1990:	
Fees (92.3%, i.e., \$1,200/1,300)	1,200.00
Disbursements (92.3% of \$28.59)	26.39
Invoice dated November 9, 1990:	
Fees (50%)	750.00
Disbursements (50% of \$34.29)	17.15
Invoice dated May 6, 1991:	
Fees (43.3%, i.e., \$325/750)	325.00
Disbursements (43.3% of \$16.62)	7.20
Invoice dated June 5, 1991:	
Fees (33.3%, i.e., \$150/450)	150.00
Disbursements (33.3% of \$50.70)	16.90
Invoice dated November 5, 1991:	
Fees (60.7%, i.e., \$425/700)	425.00
Disbursements (60.7% of \$10.94)	<u>6.64</u>
Total	\$15,395.17
Amount shown in November 7, 1991 letter	\$15,397.03
Difference	\$ 1.86

R-6-1F

LAW OFFICES

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ROY W. BOYCE
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(202) 785-0934

*VIRGINIA BAR ONLY

March 13, 1989

Raystay Company
c/o Mr. David Gardner
c/o Waymaker Company
1416 Trindle Road
Carlisle, PA 17013

For Professional Services

Coordination with David Gardner and Robert
Hoover regarding low power channel possibilities;

Coordination with Greg Daly as to transmitter site
arrangements;

Preparation and filing of five low power applications
for Red Lion, Lancaster, and Lebanon, PA.

\$ 5,200.00

Disbursements

Postage, telephone and reproduction \$22.03

CUMULATIVE TOTAL DUE \$ 5,222.03

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April 4, 1990

Raystay Company
c/o Mr. George Gardner
P.O. Box 38
Carlisle, PA 17013

RE: Adwave Company

For Professional Services

Telephone conferences with Mr.
Gardner and character witnesses
regarding preparation of Declar-
ations to satisfy Commission's
Order;

Preparation of Mr. Gardner's
Declaration and Character
Declarations of Robert W.
Chilton, Gilmore B. Seavers, Rev.
Andrew J. Fontanella, Stanley T.
Singer and Lincoln A. Warrell;

Preparation and filing on March 14,
1990 of Amendments to 5 LPTV
applications;

TOTAL \$ 4,000.00

Disbursements

Postage, telephone and reproduction \$ 84.90
(November 1989 thru March 1990)

CUMULATIVE TOTAL DUE \$ 4,084.90

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June 4, 1990

Raystay Company
c/o Mr. George Gardner
P.O. Box 38
Carlisle, PA 17013

RE: Adwave Company

For Professional Services

Preparation of Mr. Gardner's
Supplemental Declaration dated May 7;

Telephone and personal conferences
with FCC staff members regarding Mr.
Gardner's Declaration;

TOTAL \$ 1,500.00

Disbursements

Postage, telephone and reproduction \$ 7.76

Balance due from statement
dated April 4, 1990

\$ 4,106.14

6/5/90
CK 238

CUMULATIVE TOTAL DUE

\$ ~~5,613.90~~

1507.76

Pd 6/26/90
CK 634

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June 4, 1990

Raystay Company
c/o Mr. David Gardner
P.O. Box 38
Carlisle, PA 17013

For Professional Services

Preparation of memorandum dated May 8
concerning compliance with LPTV rules;

Review of documents sent by Ms. Bishop
concerning the Dillsburg LPTV station;

Filing of LPTV network affiliation
agreements with the Commission;

Discussions with Commission staff and
Ms. Bishop concerning LPTV station
records;

Preparation of letter to Ms. Bishop
dated May 16 concerning station records;

Filing EEO reports for Raystay and GH
Cable systems on May 4, 1990;

Preparation of letter to Richard
Forsyth of April 11, 1990 re aero-
nautical notices and filing on May 18,
1990 of three aeronautical notices;

Research at FCC re GH Cable Arizona
communities, notification of change of
ownership with respect thereto filed
May 23, 1990 and letter of May 23,
1990 with respect thereto;

Total

\$ 3,200.00

Disbursements

Postage, telephone and reproduction	112.39
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CUMULATIVE TOTAL DUE	\$ 3,312.39
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